

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

SCOTT J. SWAIN and KENNY FIORITO,
on behalf of the ISCO Industries Inc.
Employee Stock Ownership Plan, and on
behalf of a class of all other persons similarly
situated,

Plaintiffs,

v.

WILMINGTON TRUST, N.A., as successor
to Wilmington Trust Retirement and
Institutional Services Company,

Defendant.

C.A. No. 17-071-RGA-MPT

**PLAINTIFFS' UNOPPOSED MOTION TO AMEND SETTLEMENT AGREEMENT
AND SUPPLEMENTAL MEMORANDUM IN SUPPORT OF FINAL APPROVAL OF
SETTLEMENT AND CERTIFICATION OF SETTLEMENT CLASS**

Plaintiffs Scott J. Swain and Kenny Fiorito, Individually and as Class Representatives, submit this supplemental memorandum in support of their unopposed motion for an order approving a class action settlement agreement between Plaintiffs and Defendant Wilmington Trust, N.A. ("Wilmington Trust").¹

The Court granted Plaintiffs' motion for preliminary approval and approved class notice on January 21, 2020. (D.I. 104 and 105.) On April 21, 2020, Plaintiffs filed motions for Final Approval of the Settlement and for attorneys' fees. (D.I. 107 and 109.)

Several members of the Settlement Class (the "Best Objectors") filed objections to the Settlement and to the motion for attorneys' fees. (D.I. 111.) Among other things, the Best Objectors contend that the Settlement was not fair and reasonable because it purported to release claims in

¹ Unless otherwise defined, all capitalized terms herein shall have the same meaning as set forth in the Parties' Settlement Agreement.

connection with a subsequent transaction involving the same employee stock ownership plan in 2018 (the “2018 transaction”). (*Id.* at 5-6.) The Best Objectors filed a lawsuit in Kentucky federal court alleging violations of ERISA in connection with the 2018 transaction. *See Best v. James*, No. 3:20-cv-299-JRW (W.D. Ky.) (the “*Best* lawsuit”).

Counsel for the Parties discussed with counsel to the Best Objectors how to amend the Settlement Agreement to satisfy the Best Objectors’ concerns. After several weeks of negotiations, the Parties and the Best Objectors agreed to an amendment to the Settlement Agreement that excludes claims alleged and certain claims that may be alleged in the *Best* lawsuit. The proposed amendment to the Settlement Agreement is attached hereto as Exhibit A. Counsel to the Best Objectors has reviewed the amendment to the Settlement Agreement and has agreed to withdraw all their objections should the Court approve the amendment. In addition, Bailey & Glasser LLP has agreed to pay counsel to the Best Objectors twenty-five thousand dollars (\$25,000) for fees incurred in making objections. The payment to counsel to the Best Objectors will be paid directly by Bailey & Glasser LLP and not from the Settlement Fund. Bailey & Glasser LLP and counsel to the Best Objectors have entered into a separate letter agreement reflecting these terms, which agreement we will make available to the Court upon request.

The proposed amendment to the Settlement Agreement in no way prejudices the Settlement Class. To the contrary, it allows members of the Settlement Class to participate in a separate lawsuit without compromising the relief and benefits of the Settlement in this case.

Accordingly, Plaintiffs respectfully submit that the Court should approve the proposed amendment to the Settlement and enter a final order approving the Settlement as amended.

Dated: June 4, 2020

BAILEY & GLASSER, LLP

/s/ David A. Felice

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on June 4, 2020, a true and correct copy of the foregoing document was served on all counsel of record by electronic mail.

/s/ David A. Felice
David A. Felice